United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Corrected Brief

Original contains affidavit of mailing

76-1275

B
P/S

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1275

UNITED STATES OF AMERICA,

Appellee,

—against—

CLARENCE STALLWORTH and
JOHNNY SELLERS,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
Assistant United States Attorney,
(Of Counsel).

TABLE OF CONTENTS

PAGE

TABLE OF CASES

PAGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA,

Appellee,

-against-

DOCKET NO. 76-1275

CLARENCE STALLWORTH and
JOHNNY SELLERS,

Appellants.

- - - - - - - - - - - - - - - - - - x

PRELIMINARY STATEMENT

Clarence Stallworth and Johnny Sellers appeal from judgments of the United States District Court of the Eastern District of New York (Dooling, J.), entered June 18, 1976, convicting them, after a jury trial, of one count of attempted bank robbery in violation of Title 18, United States Code, Section 2113(a).* Appellant Sellers was sentenced to a term of ten (10) years imprisonment to run consecutively to a prior 1972 bank robbery conviction on which his parole was violated; appellant Stallworth was sentenced to a term of six (6) years imprisonment. Both appellants are presently incarcerated pursuant to those sentences.

*A second count charging appellants under Title 18, United States Code, Section 2113(d) with placing lives in jeopardy during the course of the attempted bank robbery was dismissed at the close of the government's case. Co-defendants Willie Young and Larry Peterson entered guilty pleas prior to trial. Peterson is presently serving a sentence of ten (10) years, Young is serving four (4) years pursuant to the Youth Corrections Act.

On appeal, appellants concede they were involved in a criminal conspiracy to rob the bank in question; but they challenged the sufficiency of evidence in support of the charge of "attempted" bank robbery. In short, they allege that their activities, as established by the undisputed evidence, amounted to mere preparation for a bank robbery, and did not rise to the level of an actual "attempt."

STATEMENT OF THE CASE

At trial, the government's case was established by the testimony of accomplices Rodney Campbell and Willie Young, as well as by testimony of Federal Bureau of Investigation agents who had the appellants' activities under surveilance during the course of the attempted bank robbery. Said testimony was fully corroborated by tape recordings of appellants' conversations during three days prior to the attempted bank robbery, which recordings were introduced in evidence at the trial in response to an entrapment defense. Based upon the above, the following undisputed facts were established.

Rodney Campbell, a twenty-five year old convicted bank robber, began cooperating with the Federal Bureau of Investigqtion on January 12, 1976 (101, 226).* At that time, he admitted his participation in four armed bank robberies in the Eastern District of New York between June and September of 1975 (228-230). In return for a promise of immunity, Campbell implicated his accomplices in those crimes, including, among others, Johnny Sellers and Larry Peterson . (Id.) He informed the authorities that his group was responsible for multiple armed bank robberies, and agreed to work with the Bureau, keeping the government informed of the group's activities and plans. Arrangements were made for Campbell to have the use of an undercover government vehicle, outfitted with a tape recorder and monitoring equipment (231). Campbell consented to the tape recording of any conversations taking place in his presence in the vehicle (145).

---

*Unless otherwise specified, parenthetical page references are to the trial transcript.

On January 16, 1976, Campbell reestablished contact with Sellers and Peterson. During the following week, using the specially equipped government vehicle, Sellers and Peterson together with Willie Young, Rodney Campbell and several other individuals, cased various banks in Queens, New York (109-114). Plans were formulated to commit a bank robbery on either Thursday, January 22nd or Friday, January 23rd.

On Wednesday, January 21st, Sellers, Peterson, Young and Campbell began actual preparations for the planned bank robbery. The four of them went to Model's, a department store in Flushing, Queens, where they stole ski masks for use during the robbery (115, 327). Thereafter, Sellers, Peterson and Young entered Booth Memorial Hospital in Flushing, for purposes of obtaining surgical gloves(116-17, 328). Sellers, who had recently been a patient at the hospital, visited several nurses known to him, while Peterson and Young clandestinely stole the surgical gloves (328). Finally, on that same afternoon, Peterson visited a hardware store, where he purchased a hacksaw blade and roofing nails, which he told Campbell he needed to "fix" a shotgun (117, 329).

Because of difficulties in group coordination and timing, plans to rob a United Americas bank on Thrusday morning were aborted. Instead, Sellers, Peterson, Young and Campbell spent the day casing and planning the robbery of the First National City Bank,7-24 154th Street, in Whitestone, Queens (119). Peterson, who had previously worked in a factory in the area, informed the group that Friday was payroll day at the bank; and that large amounts of cash would be on hand to accomodate the pay checks of the factory workers (126). Accordingly, it was agreed that they would rob that branch

before noon on Friday, January 23, 1976 (122-23).

In furtherance of that plan, Sellers and Peterson sent Willie Young into the target bank on Thursday afternoon; the purpose being that Young was to find out the layout of the bank, and the placement of surveilance cameras and guards, if any (119, 332-333). Young entered the First National branch, ostensibly to obtain "penny rollers" (333). When he returned to the car, he told Sellers, Peterson and Campbell that the bank was "sweet;" the counter was average height; there was only one surveilance camera located over the door; and there were no guards on the premises (120-21, 333).

Thereafter, Sellers, Peterson, Young and Campbell discussed the roles they would play during the robbery (120-21, 125-26). Sellers then announced that he would try to enlist the services of "Country" Stallworth to drive the getaway vehicle (121-22). Sellers, Peterson and Young, then returned to Peterson's apartment, and, without Campbell, further discussed their plans for the Friday morning bank robbery (334-35).

On Friday, January 23rd, Sellers, Young and Campbell met at Sellers' house (123). Using the undercover vehicle, they then proceeded to pick up Clarence "Country" Stallworth, who assumed the role of driver of the getaway vehicle (123-24). Stallworth produced a .38 caliber pistol which he gave to Willie Young (125, 338, 356-58). The four would-be bank robbers then proceeded to Peterson's apartment where they picked up Peterson, the ski masks, surgical gloves and other paraphinalia which they had obtained two days earlier (124, 337). Peterson also brought with him a sawed-off

shotgun which he gave to the appellant Sellers.

On route to the Whitestone bank, the participants completed preparations for the intended bank robbery. They covered their hands with band-aids and surgical gloves, (126-27, 130, 340), and donned the ski-caps which they were to use as masks during the robbery (127, 130). They further implemented their plans by preparing the getaway car to be destroyed by fire after the robbery. Newspapers brought from Peterson's apartment were stuffed under the front and back seats, and a container of gasoline was purchased to aid in igniting the car (125-26, 339-40).

The target bank was located in a small shopping center in Whitestone. Unknown to appellants, on the morning of January 23, 1976, the area was saturated with undercover Federal Bureau of Investigation agents and New York City police officers. As the appellants' car entered the parking lot, Sellers alighted. While the getaway car containing Stallworth, Peterson, Young and Campbell circled the shopping center, Sellers made several pedestrian passes by the target bank, looking in the bank on each trip (130, 132). Finally, at approximately 11:00 A.M., the getaway car, driven by the appellant Stallworth (133), pulled up in front of the First National City Bank. Sellers, who had by then stationed himself in front of an adjacent liquor store, looked to the getaway car and then began his move toward the bank (133, 399). Simultaneously, the car doors opened to the signal "lets go" (133, 164). At that point, the surveilance agents moved in, en masse, and effected the arrest of the appellants without incident. A search pursuant to arrest revealed, secreted on Sellers' person, a loaded sawed-off shotgun, the barrel

of which was filled with roofing nails. A loaded .38 caliber pistol was also found in the possession of Willie Young. Subsequent testing proved both weapons to be operable.

Appellants, together with Peterson and Young, were subsequently charged with attempted bank robbery in violation of Title 18, United States Code, Section 2113(a). In pertinent part, the indictment reads as follows: "On or about the 23rd day of January, 1976, within the Eastern District of New York, the defendants ... did knowingly, wilfully and feloneously, by force, violence and intimidation, attempt to take from the person and presence of employees of the First National City Bank, 7-24 154th Street, Queens, New York, a quantity of money ...."

The District Court appropriately instructed the jury that the offense charged was "attempted" bank robbery:

> "The charges made, accordingly, are charges of attempts to commit bank robbery. The first thing, then, is to be clear about what conduct amounts to an attempt to commit a crime when, for some reason, the crime is not committed.
>
> Plainly, two things are essential: first, the defendant or defendants must be shown to have definitely determined to do those thing which constitute the crime, and second, the defendant or defendants must be shown to have taken substantial and purposeful steps toward committing the crime, and those steps must be ones that are not reasonably explainable except as steps toward committing the crime.
>
> Planning and preparation do not amount to an attempt. Beyond planning and preparation, it must be shown that the defendant or defendants have taken substantial steps to carry the plan into actual execution. The attempt is complete if the actions which the defendant or defendants are taking are such that they will result in the commission of the crime if not interrupted by an unanticipated circumstance or intervention that prevents the commission of the crime planned." (590-591)

The essential elements of the crime charged were set forth as follows:

> "First, the defendant and one or more of the others named in the indictment planned that they would, acting together, take money that was in the possession of the bank employees;
>
> Second, the defendant and one or more of the others named in the indictment planned to take the money from the bank employees by force or violence or by intimidating them; and
>
> Third, that the defendant, acting with the others in accordance with their plan and with the purpose of carrying it out, took substantial and purposeful steps toward committing the robbery." (593-594).

On the element of "force, violence or intimidation," Judge Dooling charged the jury that a finding of intent to use such methods was a prerequisite to a finding of guilt under the indictment.

> The crime defined by this statute requires proof "and the indictment alleges" that the defendant's intention, his conscious determination was to take money from the person or presence of another person, and to take money in the custody or possession of the bank, and to use force, violence or intimidation in doing so. The Government must establish this purpose beyond a reasonable doubt, for example by showing that the defendants used words among themselves beforehand indicating that they planned to use words and perform acts which would produce a fear of bodily harm in the ordinary person in the position of the bank employees as a means of getting the employees to do what they wanted to do, that is, to pass the money over to them. In this connection you would consider also the evidence, if any, of each defendant's acts and his possession or non-possession of a weapon." (594-595).

Based upon the above instructions, and the evidence before them, the jury returned a guilty verdict against each of the appellants, after approximately one hour of deliberation.

ARGUMENT

THE EVIDENCE IN THIS RECORD OVERWHELMINGLY SUPPORTS THE APPELLANTS CONVICTIONS FOR ATTEMPTED BANK ROBBERY.

Conceding that they might properly have been convicted of conspiracy to commit bank robbery, had such a conspiracy been charged, appellants contend that the evidence adduced at trial fails to support their convictions for "attempted" bank robbery, as charged in the indictment. Appellants argue that their collective activities up until the time of their arrests outside the First National City Bank on January 23, 1976, amounted to "mere preparation" for a bank robbery. The intervention of law enforcement authorities before appellants actually entered the target bank, or used force, violence and intimidation on the bank employees, is, they allege, fatal to their convictions for attempted bank robbery. Appellants arguments are specious at best.

While the term "attempt" as used in Section 2113(a), is not statutorily defined, its meaning is fairly well established in case law. See United States v. Prince, 352 U.S. 322 (1957); United States v. Mandujano, 499 F. 2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975); United States v. Foster, 478 F.2d 1001 (7th Cir. 1973); Rumsfelt v. United States, 445 F.2d 134 (7th Cir. 1971); United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); United States v. Jackson, 76 CR 436, (E.D.N.Y. September 22, 1976, Mishler, J.); United States v. Bostic, 258 F. Supp. 977 (E.D. Pa. 1966); United States v. Baker, 129 F. Supp. 684

(S.D. Col. 1955). It is clear that the statutory prohibition against "attempted" bank robbery contemplates criminal sanctions for an incomplete as well as a successful criminal venture. The essence of the crime is intent to steal, corroborated by some substantial steps toward the commission of the crime.

There is, of course, no absolute standard for determining just what conduct constitutes a criminal attempt. It is well settled that the act or acts in furtherance of the defendant's intent need not be the "last proximate act before completion" for there to be an attempt. There are many federal decisions which hold that the accused has passed beyond "preparation," although he has been interrupted before he has taken the last of his intended steps. United States v. Coplon, 185, F. 2d 629 (2d Cir. 1950). Accord, United States v. Quincy, 31 U.S. 445 (1832).

The definition of attempt articulated by the American Law Institutes Model Penal Code, which was adopted by the Fifth Circuit in United States v. Mandujano, supra, 499 F. 2d at 376, and heavily relied on by Chief Judge Mishler in United States v. Jackson, supra, _____F. Supp. _____, requires that:

> First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting ... [and]
>
> Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.

That neither actual entry into the bank, nor a display of force, is necessary to commit "attempted" bank robbery is clear from

both case law and the statutory scheme. In both Foster and Bostic, supra, the defendants entered banks with the intent to take money therefrom by force, violence or intimidation. In each case, however, the plan was aborted and the defendants departed the bank without announcing their intent or otherwise displaying any force or violence. The convictions for attempted bank robbery were affirmed.

Similarly, in Rumsfelt and Jackson, supra, and in United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974), convictions for attempted bank robbery were sustained where the defendants' schemes terminated before actual entry into the target banks. Though the defendants had not neared completion of their goals, they had evidence their intent, and taken substantial steps toward fulfillment thereof.

Moreover, the statutory scheme itself provides for a charge of attempted bank robbery where plans fall short of entrance into the bank. See Prince v. United States, supra; Rumsfelt v. United States, supra. Paragraph two (2) of Section 2113(a), which provides the same twenty year penalty as paragraph one (1), prohibits attempting to enter a federally insured bank with intent to commit therein a felony affecting said bank. It is clear from the addition of paragraph two (2) in 1937 that neither entrance into the bank nor a show of force is a prerequisite to conviction. Here again, intent is the essence of the crime.

Turning to the instant case, the intent of appellants on the day in question is beyond dispute. Both Rodney Campbell and Willie Young testified as to the intent of the appellants on January 23, 1976. It was the intention of each member of the group, with

the exception of Rodney Campbell, that a successful bank robbery be perpetrated. Moreover, the appellants' intent is clearly established by the "substantial steps" taken in furtherance thereof. Appellants not only cased the bank and discussed the proposed robbery, they armed themselves with all the materials necessary to effectuate their intent. Weapons were obtained and carried; masks and gloves were obtained and donned; the getaway car was prepared for distruction. As appellant Sellers moved toward the First National City Bank at 11:00 A.M. on January 23, 1976, a bank robbery was in progress. Preparation had long since been completed. All that stood between appellants' intent and the realization thereof was the timely intervention of law enforcement authorities. Appellants' actions were clearly in violation of Title 18, United States Code, Section 2113(a).

CONCLUSION

The judgments of convictions should be affirmed.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
Assistant United States Attorney,
(Of Counsel)

Form No. USA-82a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 4th day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a CORRECTED BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Daniel H. Murphy, Esq.
233 Broadway
New York, New York

Michael Pollack, Esq.
1345 Avenue of Americas
New York, New York 10019

Sworn to before me this
4th day of October, 1976

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501956
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson
CAROLYN N. JOHNSON